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No. 85-2039

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY
AND AS ADMINISTRATRIX FOR THE
ESTATE OF HORTON JOHNSON, DECEASED

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICI CURIAE WILLIAM H. GILARDY, JR., As Special Administrator of the Estate of David Lee Thompson; FRANK W. THOMPSON; DORY THOMPSON and KIM M. THOMPSON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the doctrine of Feres v. United States, 340 U.S. 135 (1950), bars an action under the Federal Tort Claims Act brought on behalf of a serviceman killed incident to military service where the complaint alleges the negligence of civilian employees of the federal government.

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INTEREST OF THE AMICI CURIAE

Amici curiae files this brief with the consent of Charles Fried, Solicitor General, United States of America, for Petitioner, and Joel D. Eaton, Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow

and Olin, P.A., for Respondent. The letters of consent from all parties are on file with the Clerk of the United States Supreme Court.

The interest of the amici curiae in this case arises from the fact that they are parties to pending litigation arising out of the same crash. Their case under the Federal Tort Claims Act for the wrongful death of David Lee Thompson is pending in the United States Court of Appeals for the Ninth Circuit. Thompson was a crew member killed in the same helicopter and his case (Gilardy, et al. v. United States, Civ. No. 84-2269) has been stayed pending the decision to be rendered in this case.

The issues raised by the Petitioner of concern to amici curiae are, first, the Petitioner's attempt to misrepresent and argue the facts surrounding the flight in

question and, second, the need for this Court to establish clear procedural and substantive standards for judicial determination of whether a serviceman's claim is barred by the Feres Doctrine.

STATUTES INVOLVED

Fed. Rule Civ. Pro. 12(b)(1):

> **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter,....

Fed. Rule Civ. Pro. 12(d):

> **Preliminary Hearing.** The defense specifically enumerated (1) - (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

SUMMARY OF ARGUMENT

The just resolution of this case (and every case in which the government asserts the Feres Doctrine as a defense) requires a full exposition of the facts surrounding the tort so that a determination can be made as to whether the litigation will have a substantial adverse impact on military discipline. This case is presented to the Court on the pleadings. The District Court granted a motion to dismiss under Rule 12(b)(1) based on the allegations of the complaint and undisputed facts. Therefore, the allegations of the complaint are deemed to be true. Smith v. Gross, 604 F.2d 639, Fn. 1 (9th Cir. 1979) and Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 603 (9th Cir. 1976).

However, the Petitioner's Brief adds, edits, and argues facts not within the

pleadings which differ drastically from those facts alleged and undisputed in Johnson and Gilardy. Amici believe that the facts of the same accident as developed and plead in Gilardy are more developed and accurate and will provide a sounder basis for this court to make its determination.

Since this Court's decision in Feres v. United States, 340 U.S. 135 (1950), courts have applied and interpreted the Feres Doctrine without a factual development of the record. This has resulted in simplistic and strict applications of the Feres Doctrine with the result of incredulous and meaningless distinctions between those lawsuits which have been allowed and those barred by the Feres Doctrine. This case comes to the Court in that same "classic" procedural posture - a Rule 12 motion to dismiss for lack of

subject matter jurisdiction followed by an appeal to the Courts of Appeal. It provides this Court with the unique vehicle to articulate procedural standards for the resolution of the Feres defense and to establish a standard for resolving this complex factual issue ("Will the litigation, based on the facts of each case, have a substantial adverse impact on military discipline?) in the context of a Rule 12 motion asserting that the court has no subject matter jurisdiction.

ARGUMENT

1. PETITIONER'S STATEMENT OF FACTS AND USE OF THOSE FACTS IN ITS BRIEF IS NOT SUPPORTED BY THE PLEADINGS IN EITHER THE JOHNSON CASE OR THE GILARDY CASE.

In both cases the District Courts, in an unreported opinions, granted motions to dismiss under Rule 12(b)(1) based on the allegations in the complaints and

undisputed facts. Therefore, the allegations of the complaints are deemed to be true. Smith v. Gross, 604 F.2d 639, fn.1 (9th Cir. 1979) and Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 603 (9th Cir. 1976). However, the Petitioner by adding, deleting and editing the facts as they have seen fit has placed before this Court an accident and underlying set of facts that raise issues of fact that were never considered or decided by the District Courts or the Courts of Appeals.

Petitioner describes events leading up to the accident as, "[W]hile searching for the boat Lt. Commander Johnson requested radar assistance from the Federal Aviation Administration (FAA) air traffic controllers." (Petitioner's Opening Brief at 2.) However, as pled and argued before the District Courts,

this accident occurred after the rescue mission had been cancelled. Lt. Commander Johnson then elected to proceed to Maui to refuel at a civilian airport and wait for daybreak.

The "military mission" the government tries to attribute to this flight was terminated and the helicopter was proceeding to Maui as any other civilian aircraft would. Enroute to Maui, Lt. Commander Johnson requested FAA radar assistance to the civilian airport there. The FAA controller was required to give Lt. Commander Johnson an altitude and a heading that would have safely guided the helicopter around the mountains of the island of Molokai. However, the heading was negligently given and placed the Coast Guard helicopter on a collision path with Molokai's mountains. The helicopter's instruments were frozen in

place from the crash and the recorded radar data transmissions show that Lt. Commander Johnson was flying on the precise heading and altitude assigned by the FAA.

This accident is indistinguishable from a civilian accident in which the FAA would have clear liability. See Ingham v. Easter Air Lines, Inc., 373 F.2d 227, 238 (2nd Cir. 1967); United States v. Furumizo, 381 F.2d 965, 967-969 (9th Cir. 1967); Wasilko v. United States, 300 F.Supp. 573 (N.D. Ohio 1967), aff'd. 412 F.2d 859 (6th Cir. 1969); and Dreyer v. United States, 349 F.Supp. 296 (N.D. Ohio 1972). See also United States v. Murray, 463 F.2d 208 (10th Cir. 1972), holding a pilot has a reasonable right to expect air traffic control services offered by the FAA to be timely and safe and that he will be safe if he relies upon such

services. Lt. Commander Johnson and his crew relied entirely upon the FAA to guide them safely to Maui, the same as any civilian pilot.

Despite the Petitioner's contentions to the contrary, the FAA air traffic controllers were not called upon to assist in a dangerous military operation (Petitioner's Opening Brief at 15). It is a distortion and misrepresentation of the true issue involved in this case to imply that this flight was part of "a wide range of important military operations" (Petitioner's Opening Brief at 15). Very simply, as plead and argued at the District and Appellate Courts below, the rescue operation had been cancelled. The Coast Guard helicopter was proceeding in a normal, nonemergency, nonmilitary basis to a civilian airport to refuel, the same

as would a civilian aircraft in a similar situation.

As this court has clearly enunciated in United States v. Shearer, No. 84-194 (June 27, 1985), slip op. 5-7, the critical test to determine whether or not the Feres doctrine will apply in an accident involving military personnel is whether the claim of the serviceman will call into question the decisions and discipline of the military. The Petitioner has had to misrepresent the facts of this case in an attempt to construe this accident as one covered by the Feres doctrine. It plainly is not. It is an accident whose occurrence is identical, in every respect, to that of a civilian operation in which the FAA would be liable.

The focus of this Court's attention should not rest solely on whether the

accident's occurrence was "incident to military service" (Petitioner's Opening Brief at 9). As this court said in Shearer:

> But the site of the murder is not nearly as important as whether the suit requires the civilian court to second guess military decisions, See Stencel Aero Engineering Corp., 431 U.S. 666, 673, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977) and whether that suit might impair essential military discipline, See Chappell v. Wallace, 462 U.S. 296, 300, 304, 76 L.Ed.2d 106, 103 S.Ct. 2362 (1983). Id., slip op. 6.

There is no proof or evidence, submitted on the pleadings or argued below, that this type of suit would mean that "commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions . . . ." Shearer, slip op. 7. The allegations of the complaint limit the negligent acts solely to the FAA air traffic control services.

Negligence of any other party, or of any other type, is not at issue in this lawsuit. The Petitioner has made no showing other than broad, unsupported assertions that this lawsuit would implicate military discipline.

In the District Courts below, the Petitioner did not argue that military discipline would be affected or that military discipline would be implicated. Now, Petitioner, through its creative use of facts, is hoping to sway this court into an opinion that will bar the decedent's lawsuit against the FAA, a civilian agency of the United States. Petitioner characterizes this suit as requiring military officers to testify about command decisions, as having a substantial effect on military discipline and as opening the flood gates to litigation (Petitioner's Opening Brief at 6).

Nothing could be further from the truth. What this Court will do by upholding the decision of the Eleventh Circuit Court of Appeals will be to allow military personnel the same rights to a full trial under the Federal Tort Claim Act as afforded all citizens of the United States because maintenance of the suit will not affect military discipline.

The pleadings in these cases do not allege or implicate the military or military discipline. Therefore, we ask that this Court uphold the decision of the Eleventh Circuit Court of Appeals in Johnson v. United States.

2. IN CASES WHERE THE EFFECT ON MILITARY DISCIPLINE IS QUESTIONABLE, SUBJECT MATTER JURISDICTION SHOULD NOT BE DETERMINED UNTIL AFTER DISCOVERY AND/OR TRIAL

As this court succinctly stated in Shearer:

> The Feres doctrine cannot be reduced to a few bright line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases. Id., slip op. 5.

The Petitioner in its brief is requesting this Court to ignore the language carefully chosen and written just one year ago in Shearer and, in essence, create a bright line rule. This is most clearly evidenced by the Petitioners comment in their brief which reads, "It is our view that federal employees are immune from common law tort actions arising in the course of their duties." (Petitioner's Opening Brief at 17, fn. 8.) If that were the case then the

Federal Tort Claims Act might as well be repealed. For 32 years this Court has not deviated from the rule that the primary emphasis and focus in applying the Feres doctrine is the potential for involving "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." Shearer, slip op. 7. As this Court has consistently held:

> [I]n the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the tort claims act were allowed for negligent orders given or negligent acts committed in the course of military duty.' United States v. Shearer, No. 84-194 slip op. 5, quoting United States v. Muniz, 374 U.S. 150, 162, 10 L.Ed.2d 805, 83 S.Ct. 1850 (1963), quoting United States v. Brown, 348 U.S. 110, 112, 99 L.Ed. 139, 75 S.Ct. 141 (1954).

The District Courts cannot possibly make such an intricate and important

decision without a review of each suit on a case by case basis. In some cases the determination can be made easily on the face of the pleadings (e.g., a lawsuit against a superior or a military command, or one in which the decisions of military officers are part of the allegations). Other cases clearly will not invoke the Feres doctrine (e.g., when a military officer is injured by a civilian employee of the government while not on active duty and off the military installation). See, Johnson v. United States, 704 F.2d 1431, (9th Cir. 1983); and Brown v. United States, 715 F.2d 463 (9th Cir. 1983). The balance of the cases will require their own factual analysis.

With respect to the many cases which are not so "clear", Rule 12 motion to dismiss are an inadequate means of resolution, as applied by District Courts

in deciding this defense. Rule 12(d) of the Federal Rules of Civil Procedure, 28 U.S.C., provides for the hearing and determination of motions to dismiss pursuant to Rule 12(b) before trial on application of any party, "unless the court orders that the hearing and determination thereof be deferred . . ." Fed. Rule Civ. Proc 12(d). When motions to dismiss may be heard or determined is within the discretion of the court. It would be premature for the court to dismiss for want of subject matter jurisdiction without a full development of the facts and a showing of the potential effect on military discipline.

The courts have applied this rule on a regular basis and without difficulty in other types of cases. (See Simanonok v. Simanonok, 787 F.2d 1517 (11th Cir. 1986); Daigle v. Opelousas Health Care,

Inc., 774 F.2d 1344 (5th Cir. 1985)). In an anti-trust case a motion to dismiss for lack of federal jurisdiction over the subject matter was improperly granted when the exact effect of defendant's conduct on interstate commerce was not known. It was held that determination of subject matter jurisdiction should have awaited a further exploration of the facts so that the defendant's conduct could be more clearly determined. Mar-Farr Corp. v. Copley Press, Inc., 64 F.R.D. 456 (D.C.Ill. 1974). Likewise, the Federal Courts lack jurisdiction in a diversity case if the amount in controversy is $10,000 or below (28 U.S.C. §1332), but often, that determination requires the Court to defer ruling on the motion until more facts and evidence are produced. Etheridge v. Piper Aircraft Corp. 559 F.2d 1027 (5th Cir. 1977).

Application of the Feres doctrine is most closely analogized to the determination of sovereign immunity of foreign nations. In Sea Transport Corp. v. S/T Manhattan, 405 F.Supp. 1244, (D.C.N.Y. 1975), the defendant, a cosignee in an action arising from the collision of a ship carrying a cargo of wheat, was the ministry of food of a foreign nation. The defendant filed an affidavit asserting that it was a government engaged in the purely governmental function of distributing food and other necessities to its people and that it did not engage in trade or commercial activities. However, it failed to state whether the wheat was intended for resale or for free distribution. Additionally, the court had no statement on the issue from the State Department. As a result, the court deferred the decision on the cosignee's

motion to dismiss for lack of subject matter jurisdiction in order to permit the parties to obtain a communication from the State Department and to submit further evidence. Sea Transport, supra, at 1246-47.

The same complex issues arise when the government files a motion to dismiss for lack of subject matter jurisdiction invoking the Feres doctrine. When there are no allegations in the pleadings implicating military decisions, the trial court should reserve ruling on the motion until further evidence is produced.

This precise issue is addressed in Wright and Miller, Federal Practice and Procedure, §1350, Pages 556-559:

> The court, not a jury, must weigh the merits of what is presented on a Rule 12(b)(1) motion, although the court has the discretion to impanel a jury, or refer the question to a master. If, however, a decision of the jurisdictional issue requires a

> ruling on the merits of the case, the decision should await a determination of the merits either by the court on a summary judgment motion or by the fact finder at trial. The court may postpone a decision on the jurisdictional issue for several reasons. It may seek the presentation of affidavits or other evidence on the matters if none have been tendered or if those that have been offered are inclusive. It may also allow discovery to be completed on the issue and further hearing to be held before ruling on the motion or as indicated earlier it may postpone a decision until evidence is submitted at trial if the jurisdictional issue is intertwined with the merits of the case. (Also see cases cited therein.) Id. at 556-559.

Applying those principles to Feres doctrine cases will promote fair and consistent holdings by the lower courts. In the case before this Court, Lt. Commander Johnson's rescue mission had terminated. He was proceeding on a course to Maui just as any civilian aircraft would proceed and had requested enroute radar service from the air traffic center because of the poor weather. There was

no on-going emergency or rescue mission, not special assistance to the military in the performance of their defense functions. The services rendered to Lt. Commander Johnson were indistinguishable from those services rendered to civilian aircraft. Clearly, a fuller development of the facts was required before the District Courts could decide either of the motions below.

In this case, as in many others, Courts should defer or abstain from ruling on the question of subject matter jurisdiction until further investigation and discovery of each case is conducted. At any time in the proceedings when the evidence or the issues begin to involve "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (Shearer, slip op. 7), then the District Courts, by notice of

motion or suggestion to the Court, can rule that the Feres doctrine applies. This is simply a basic rule of fairness, one that upholds the Federal Tort Claims Act, the decisions of this Court, and the interest of military personnel throughout this country. When the judicial inquiry will not or does not affect military discipline, then our servicemen and women should be afforded the same rights as all United States citizens and be allowed to maintain a suit against a civilian agency of the government that negligently performs its duty.

The only practical way both the individual member of the Armed Forces and the Government can have equal and fair protection is for the Courts to defer ruling on a 12(b)(1) motion for lack of subject matter jurisdiction until they have sufficient facts or proof that the

lawsuit will question military decisions or affect military discipline. Until that is shown, there is no just or fair policy to support invoking the Feres doctrine.

CONCLUSION

The Judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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